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No. 660

In the
Supreme Court of the United States

OCTOBER TERM, 1963

SEATTLE BUILDING AND CONSTRUCTION TRADES COUNCIL, an association, JAMES K. BENDER, EUGENE V. NELSON and JOHN DOE, *Petitioners,*

vs.

RUSTY ROSLING and JACK BEHAR, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

HUGH HAFER
RICHARD P. DONALDSON
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Seattle, Washington
Counsel for Petitioners.

THE ARGUS PRESS SEATTLE WASHINGTON

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No. .....

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Washington

Petitioners pray that a writ of certiorari issue to review the judgment of the Washington State Supreme Court entered in the above entitled case on October 7, 1963. The judgment (R. 40)[1] is printed in Appendix A, *infra*, pg. 17.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the Superior Court, King County, Washington (R. 27-28), is unreported. It is printed in Appendix B, *infra*, pg. 19. The opinion of the Washington State Supreme Court (R. 32-39) is reported in 162 Wn.2d 888, 385 P.2d 29, and is printed in Appendix C, *infra*, pg. 21.

[1] Record references are to the pages of the certified record filed in this Court.

JURISDICTION

A brief statement of the facts in this case must necessarily precede Petitioners' statement of jurisdiction. Petitioners engaged in peaceful picketing at the premises of a construction job site (R. 19). The construction work was being done by Respondents on an apartment and commercial building which Respondents leased and operated (R. 17). Respondents employed, in connection with this work, approximately 25 non-union building tradesmen (R. 17). These non-union building tradesmen received "wages substantially below the prevailing union scales in the . . . area . . ." (R. 33). The purpose of the picketing was to protest such substandard wages (R. 19, 21). As the court below noted (R. 33):

> "The picketing was peaceful and no attempt was made to secure a collective bargaining agreement, nor to compel union affiliation by the employees."

Without explication of its ratio decidendi, the trial court held that the Union's picketing "was coercive" (R. 28) and "permanently enjoined [Petitioners] from picketing: . . . [Respondents'] establishment . . ." The trial court further ordered that Respondents "recover against [Petitioners] the sum of $100.00 together with their costs and disbursements incurred herein" (R. 25). Injury to the extent of $100 had been agreed upon (R. 20).

On appeal, the court below—*sua sponte* and without notice to counsel—held that if the construction work were completed, the case was moot (R. 35). The case was remanded for "further findings of fact relating to this question, with directions to dismiss the appeal, if

it found that the construction is completed" (R. 35). One judge dissented since the opinion below "completely overlooks the fact that *$100 damages* and costs have been awarded to respondents" (R. 36) (Emphasis added).

The Union, of course, concedes that the construction work was finished many months ago. Accordingly, "[s]ince there was nothing more of substance to be decided in the trial court, the judgment below [is] final within the meaning of 28 USC, Sec. 1257"; and this petition therefore, seeks review of a "final" judgment. *Local No. 438 v. Curry*, 371 U.S. 542, 9 L.Ed.2d 514, 521.

Mootness, for purposes of review by this Court, depends upon whether the judgment of this Court "will have some material effect" (*Pollard v. United States*, 352 U.S. 354, 358) and not upon the vagaries of state practice. Here, as in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 459, the plaintiff "sought a monetary award" and "the case is [therefore] a continuing controversy." *Accord*: *Standing Fashion Co. v. Magrone Houston Co.*, 258 U.S. 346, 353. Moreover, here as in *Local 74, Carpenters v. Labor Board*, 341 U.S. 707, 715:

> "This case has not been rendered moot by the completion of the renovation project. * * * The underlying dispute . . . has not been shown to have been resolved."

For the foregoing reasons, it is respectfully submitted that this case presents a final judgment in a justiciable controversy; and is subject to review by this Court pursuant to 28 USC Sec. 1257(3).

QUESTION PRESENTED

Whether peaceful picketing for the purpose of protesting substandard wages is protected by the First and Fourteenth Amendments to the Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

All of the facts in this case are stipulated and undisputed. The stipulation, in toto, reads as follows (R. 17-21):

> "1. [Respondents] are the lessees and operators of a certain apartment and commercial building, known as the "Lindberg Apartments," located at 615-27 Queen Anne Avenue, Seattle, King County, Washington.

"2. [Respondents] are presently engaged in doing certain construction work in and to said building under the name Jack Behar Construction Company. The value of the construction work is in excess of $50,000.

"3. For the purpose of accomplishing said construction work [Respondents] have hired approximately 25 electricians, plumbers, carpenters, laborers and other employees. None of these employees is a member of the Seattle Building and Construction Trades Council or any of its affiliated unions. [Respondents] compensate these employees as follows:

Electricians	$2.50 per hour
Plumbers	$2.50, $3.50 and $4.00 per hour
Laborers	$1.50, $1.75 and $2.00 per hour
Carpenters	$2.50 per hour

The [Respondents] provide no health and welfare, vacation, holiday or pension benefits to said employees.

"There is no quarrel between the [Respondents] and their employees concerning these wages, or any of the other working conditions provided.

"4. Many of the aforesaid employees were employed by the [Respondents] as the result of a newspaper ad which they have run in the Seattle *Times* and which reads as follows:

"'$120 — 6 DAY WEEK. Electricians, plumbers, carpenters, plasterers. See Ralph at 615 Queen Anne Ave.'

"5. The [Petitioner] Seattle Building and Construction Trades Council is a labor organization

having its principal office in Seattle, King County, Washington. [Petitioner] Eugene Y. Nelson is President of the Council and James K. Bender is the Secretary-Treasurer. The Council consists of 19 affiliated building and construction trades unions in the Seattle area including Plumbers Local 32, Electricians Local 46, and Laborers Local 242. The membership of the affiliated unions is approximately 10,000.

"6. The various unions affiliated with the Council have negotiated over the years with hundreds of employers in the Seattle Building and construction industry. At the present time there are over 100 collective bargaining agreements in effect covering approximately 10,000 employees. Among other things these agreements provide wage scales for various craftsmen as follows:

Electricians	$4.07½ per hour plus 16c vacation and 10c health and welfare
Plumbers	$4.18 per hour plus 18c vacation, 11c health and welfare and 11c pension
Laborers	$3.15 per hour plus 10c health and welfare and 15c pension

The Seattle Local of the Carpenters Union is not presently affiliated with the Council, but the scale for carpenters, under its contracts, is $3.78 per hour, plus 10c health and welfare and 10c pension.

"7. After learning of the facts stated in Paragraphs 1, 2, 3 and 4 above, the Council caused a letter to be written to the [Respondents] on March 20, 1962. A copy of this letter is attached hereto and by this reference is made a part hereof.*

*The letter reads as follows:

7

"JAMES K. BENDER

March 30, 1962

Rossling and Behar
615 Queen Anne Avenue
Seattle, Washington
Gentlemen:

The Seattle Building and Construction Trades Council is an organization made up of all the Building Trades Unions in the Seattle area. For more than half a century these unions and their members have worked tirelessly, and often at great sacrifice, to improve the wages, hours and working conditions in the Seattle area construction industry. Today, as a result of these efforts, the wages, hours and conditions which prevail in the industry are among the best in the entire nation. This has not only benefitted the construction workers and their families, but has also contributed to the general prosperity of the area.

The good standards which prevail, however, are constantly threatened by contractors who pay lower wages, work longer hours, or fail to provide decent fringe benefits and working conditions. Because of the highly competitive nature of the construction industry, if one contractor pays sub-standard wages, the other contractors will attempt the same thing. In short, this sort of pressure can destroy the good conditions which took years to build up. For this reason, our affiliated Unions have asked this Council to take active steps to publicly protest the existence of substandard conditions, wherever they may be found.

In this connection, it has come to our attention that you are employing men who are not receiving prevailing wages and fringe benefits such as vacation and health and welfare.

In view of this fact, we will place a picket on this project some time Thursday, March 22, 1962.

The picket will be instructed to act properly and courteously and not to block any entrances or driveways. This letter should not be construed as a request for recognition. Neither this Union nor any of the affiliates of the Seattle Building and Construction Trades Council, represents a majority of your employees and accordingly we do not seek to bargain with you or to execute a contract with you.

Likewise, we are not conducting an organizing campaign or seeking to pressure your employees into joining a union. Federal and State Laws protect their right to voluntarily join or not to join, as they see fit and we respect that right. We are interested only in seeing that you afford your employees the minimum wages, hours and working conditions which prevail in this area.

Our program of publicity shall continue until such time as you establish that you are no longer undercutting the prevailing standards.

If you have any questions, please call the undersigned.

Sincerely yours,

SEATTLE BUILDING & CONSTRUCTION TRADES COUNCIL

Secretary
James K. Bender.

JKB:ss
opeiu #8
afl-cio"

"8. Thereafter, on or about March 22, 1962, Council caused a picket to patrol in front of the [Respondents'] premises wearing a sign reading:

"'J. Behar Contractors
Unfair to Unions
Affiliated with Seattle
Building and Construction
Trades Council.
Substandard Wages
and Conditions.'

For a time, another picket joined the first one, wearing an identical sign. At the time the temporary injunction was issued, Friday, April 13, there was only one picket.

"9. At all times the picketing has been peacefully conducted.

"10. At no time did the Council, or any of its affiliated locals, make any demand upon the [Respondents] for a collective bargaining agreement or a demand that [Respondents] require their employees to join the Council or any of its affiliated unions.

"11. At all times [Respondents'] employees have ignored the picketing and have continued working.

"12. Various construction suppliers and truck drivers delivering construction supplies learned of the picketing, or have observed the picketing and, thereafter, have ceased to supply or deliver the supplies ordered by the [Respondents]. Certain other suppliers continued to supply construction supplies to [Respondents] which the [Respondents] had to pick up at the suppliers places of business. One supplier of plasterboard and plywood continued to supply and deliver such materials.

"13. As a result of [Respondents'] failure to obtain certain supplies, as described in Paragraph

12. [Respondents] have incurred additional expenses of $100.00.

"14. [Respondents] have commitments under which the building should be completed before the end of April, 1962.

"15. Commercial tenants of plaintiffs, on the ground floor of the building, have complained to [Respondents] and requested that the pickets be removed because of damage to their businesses. Neither the [Respondents], nor the tenants, referred any such complaint to the Council.

"16. The value of construction materials annually purchased by the [Respondents], for use in Behar Construction Company activities, from sources directly and indirectly outside the state of Washington, does not exceed the sum of $50,000."

Petitioners' answer affirmatively alleged that the "picketing program constitutes the exercise . . . of the right of free speech as guaranteed them by the First and Fourteenth Amendments to the Constitution of the United States" (R. 33). This contention was reasserted in the court below (R. 30). The trial court rejected the Petitioners' claim of federal right (R. 27-28); and the court below, having concluded that the case was moot, declined to consider the federal issue presented in this case (R. 35).[2] Petitioners have not as-

[2] As the dissenting judge in the court below observed (R. 37-39), the majority without comment or explanation departed from a long line of Washington decisions in holding that this case was moot. The majority below simply refused to acknowledge the obvious relevance of the fact that $100.00 damages were awarded. The majority disposition of this case in the court below recalls to mind Justice Holmes' statement that: ". . . the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24. *See also: Staub v. Baxley*, 355 U.S. 313, 318-319; *Ward v. Love County*, 253 U.S. 17, 22.

serted as a defense in this case the doctrine of federal preemption since Respondents' purchases do not meet the dollar value jurisdictional standards of the National Labor Relations Board (R. 20). *See e.g.* National Labor Relations Act, as amended, 29 USC Sec. 164(c).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is in Conflict with the Decisions of This Court.

We are here concerned with peaceful picketing (R. 33) which "is the workingman's means of communication." *(Drivers Union v. Meadowmoor Co.*, 312 U.S. 287, 293). As explained in *Carlson v. California*, 310 U.S. 106, 112-113:

> "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern. * * * [Publicizing] the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth, or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a state."

It is true that during the past twenty years or so this Court, in a series of cases, has recognized areas of permissible state regulation of peaceful picketing. Thus, mass picketing or picketing enmeshed with violence is amenable to restraint.[1] Similarly, picketing at a location having no economic nexus with the union's dis-

[1] *Drivers Union v. Meadowmoor Co.*, 312 U.S. 287; *Hotel Employees v. Wisconsin Board*, 315 U.S. 437.

pute has been lawfully enjoined.[4] And picketing which is conducted for a purpose which is in violation of a valid state policy has been enjoined without trespass upon constitutional right.[5]

But in this case the picketing was peaceful (R. 19); it was conducted at the site of the Respondents' construction job (R. 19); and was carried on for the purpose of protesting substandard wages (R. 18-19, 21-22). "[N]o attempt was made to secure a collective bargaining agreement, nor to compel union affiliation by the employees" (R. 33). Accordingly, the damages awarded in this case cannot be justified under any exception which this Court has recognized in First Amendment picketing litigation.

The "rule" in the State of Washington is that picketing can be enjoined if it is "coercive."[6] That rule was

[4] *Carpenters Union v. Ritters' Cafe*, 315 U.S. 722.

Picketing to compel employer to compel employees to join the union: *Teamsters Union v. Vogt*, 354 U.S. 284; *Plumbers Union v. Graham*, 345 U.S. 192; *Building Service v. Gazzam*, 339 U.S. 532.

Picketing of self-employed persons: *Teamsters Union v. Hanke*, 339 U.S. 470. *But cf. Senn v. Tile Layers Union*, 301 U.S. 468.

Picketing to compel violation of state anti-trust laws: *Giboney v. Empire Storage Co.*, 336 U.S. 490.

Picketing to compel pro-rata hiring of minority groups: *Hughes v. Superior Court*, 339 U.S. 460.

[5] In *Burkhamer v. Retail Clerks Union*, 53 Wn.2d 17, 19, 330 P.2d 314, 315, relied upon by the trial court in this case (R. 27), it is said:

"In that case [*Audubon Homes v. Spokane Bldg. & Constr. Trades Council*, 49 Wn.2d 145, 298 P.2d 1112], we suggest that if picketing is merely persuasive, it is within the constitutional guarantee of free speech if it is coercive, it is against the state's public policy."

In *Audubon Homes*, the Washington Supreme Court said (49 Wn.2d at 149, 150, 298 P.2d at 1114, 1115):

". . . this court has held that a labor dispute does not exist when no member of the picketing union is employed by the person whose *premises are picketed*." (Italics in original)

(Continued on Page 12)

applied in this case (R. 27). Precisely the same "rule" was considered by this Court and rejected in *Teamsters Local 795 v. Newell*, 356 U.S. 341, reversing *per curiam* 181 Kan. 898, 317 P.2d 817.[7]

Presumably, Respondents will assert that *Newell* is inapposite because that case—unlike the case at bar—involved a dispute between employees or former employees and their employer. It is respectfully submitted, however, that this difference is not of constitutional significance. Here, the picketing was peaceful and was for a legitimate purpose.[8] The absence of a controversy between Respondents and their employees is therefore immaterial. *Cafeteria Union v. Angelos*, 320 U.S. 293, 296; *Bakery Drivers v. Wohl*, 315 U.S. 769, 774; *A.F. of L. v. Swing*, 312 U.S. 321, 326. Nor is is significant that as a result of the picketing Respondents "incurred additional expenses of $100.00" (R. 20). A "right to a 'remedy' against the lawful conduct of another" does not arise merely because of incidental economic loss. *Senn v. Tile Layers Union*, 301 U.S. 468, 483; *Thornhill v. Alabama*, 310 U.S. 88, 104.

The Petitioners' picketing program was peaceful and sought a lawful end. Yet damages were assessed. The Petitioners' claim of constitutional protection was

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Footnote 6, continued:

"When there is no labor dispute and the picketing is coercive rather than persuasive, such picketing violates the declared public policy of the state (RCW 49.32.020), and an injunction will issue."

[7] In *Newell*, the Kansas Supreme Court said (317 P.2d at 829):

"Coercive picketing is unlawful and contrary to the public policy expressed by the legislature of Kansas."

[8] The trial court in this case neither held nor suggested that picketing in protest of substandard wages is for a *purpose* which violates state law. There is no state statute or court decision suggesting that such *purpose* is unlawful.

brushed aside by the simple expedient of labeling Petitioners' conduct "coercive." After *Newell*, 356 U.S. 341 that judicial *ipse dixit* will not suffice.

2. The Decision Below Is in Direct Conflict with Decisions Rendered in Six Other States.

In recent years labor's right to peacefully picket in protest of substandard wages has been unsuccessfully challenged in six states.[9] For example, *Pueblo Building & Construction Trades v. Harper Construction Co.*, 134 Colo. 469, 307 P.2d 468, involved, as does the instant case, peaceful picketing with signs protesting "substandard wages" paid by a non-union employer. In holding such picketing to be constitutionally protected the Colorado Supreme Court stated (307 P.2d at 474):

> "It must be conceded in the instant case that the objective of the defendants was by peaceful means to persuade the plaintiff to adopt the prevailing wage rates paid by other employers in the area, by calling attention of the public to its dereliction in that respect. * * *. As we said in *Denver Local Union v. Perry Truck Lines*, 106 Colo. 25, 101 P. (2d) 436. 'The wage scale and working conditions of plaintiffs' operations reflect themselves in all like operations. The margin of difference * * * might become an important competitive factor with others in like business, so as to force the adoption of the lower scale by those who employ members of defendant's union.'"

[9] Long before *Thornhill v. Alabama*, 310 U.S. 88, this Court recognized that workingmen "are bound to be affected by the standard of wages of their trade in the neighborhood." *American Steel Foundries v. Tri-City Council*, 257 U.S. 184, 209. *See also*: *Thornhill*, 310 U.S. at 103. Similarly, the *National Labor Relations Board*, which has special expertise in the labor field, has repeatedly upheld the legality of picketing in protest of substandard wages. *See e.g.*: *Calumet Contractors*, 133 NLRB 512, 513; *Claude Everett Construction Co.*, 136 NLRB 321, 323.

Accord:

Carpenters v. Storms Construction Co., 84 Ariz. 120, 324 P.2d 1002, 1004-1005 (1958);

Self v. Wisener, 266 Ark. 58, 287 S.W.2d 890, 892 (1956);

Starr v. Cooks Union, 244 Minn. 558, 70 N.W. 2d 873, 875, 879 (1955);

Hanson v. Operating Engineers, — La. App. —, 79 So.2d 199, 203, 219-220 (1955);

Purcell v. Journeyman Barbers, 234 Mo. App. 843, 133 S.W.2d 662, 669 (1939).

The Washington courts have ruled contrariwise.

The right to picket in protest of substandard wages has been repeatedly upheld in states other than Washington as an exercise of First Amendment rights. A substantial number of employers do not meet the dollar volume standards of the National Labor Relations Board. In such circumstances labor has no effective means, other than peaceful picketing, for redress of its grievances and the protection of its wage standards. This is such a case. The issue involved is an important one and justifies consideration by this Court. *Cf. Thompson v. Louisville*, 362 U.S. 199, 203.

CONCLUSION

For the foregoing reasons this petition should be granted.

Respectfully submitted,

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APPENDICES A, B AND C

Appendix A—Remittitur from Supreme Court of the State of Washington for King County 17

Appendix B—Memorandum Opinion of Superior Court of the State of Washington for King County 19

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RUSTY ROSLING and JACK BEHAR, *Respondents*,

vs.

SEATTLE BUILDING AND CONSTRUCTION TRADES COUNCIL, an association; JAMES K. BENDER; EUGENE V. NELSON and JOHN DOE, *Appellants*.

REMITTITUR
No. 36725

King County
No. 582124

This is to certify that the opinion of the Supreme Court of the State of Washington filed on September 5, 1963, became the final judgment of this court in the above entitled case on October 7, 1963. This cause is remanded to the superior court from which the appeal was taken for further proceedings in accordance with the attached certified copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Two Hundred Fourteen and 57/100 ($214.57) Dollars in favor of respondents and against appellants and their surety Continental Casualty Company.

ss: Court Reporter

Bassett & Donaldson
Mr. Richard P. Donaldson

Rosling, Williams, Lanza & Kastner
Mr. Henry E. Kastner

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 8th day of October, A.D. 1963.

WILLIAM M. LOWRY
Clerk of the Supreme Court, State of Washington.

[R. 0040]

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

RUSTY ROSLING and JACK BEHAR, *Plaintiffs,*

vs.

SEATTLE BUILDING AND CONSTRUCTION TRADES COUNCIL, an association; JAMES K. BENDER, EUGENE V. NELSON and JOHN DOE, *Defendants.*

No. 582124

MEMORANDUM OPINION

Filed in County Clerk's Office, King County, Washington, April 23, 1962. Norma R. Riddell, Clerk. By L. H. Ward, Deputy.

MESSRS. ROSLING, WILLIAMS, LANZA & KASTNER
Attorneys for Plaintiffs,

MESSRS. BASSETT, DAVIES & ROBERTS
Attorneys for Defendants.

This matter having been submitted to the court on stipulated facts, a formal trial having been waived, and the court having considered the stipulated facts and finding them to be, in his opinion, proper, now renders this memorandum opinion to the parties:

The court feels that this case is controlled by the case of *H. G. Barkhamer v. Retail Clerks Union, Local No. 629*, 53 Wn.(2d) 17, being, the court feels, the latest decision of our Supreme Court on the subject. In that case the court says, at page 19, that they regard as an adequate basis for determination of the controversy in that case, which is identical to the controversy in this case, that injunctive rights—where there are no labor

disputes— ". . . are limited to situations where the picketing is against the state's public policy. Tortious conduct will, under certain conditions, be restrained. The legality of [0027] picketing, which does not arise out of a labor dispute, depends upon the propriety of its objectives. There may be a balancing of rights and consequences, . . ."

Therefore, in this case, under the stipulated facts, the court finds that the conduct of the defendants was coercive in nature and should be restrained.

The court can only pass upon those facts which are before it, and under the settled law of this state, if the picketing is coercive in nature, it is properly restrained.

DATED this 23rd day of April, 1962.

JAMES W. MIFFLIN
Judge.

[0028]

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RUSTY ROSLING and JACK BEHAR, *Respondents*, vs. SEATTLE BUILDING AND CONSTRUCTION TRADES COUNCIL, an association; JAMES K. BENDER; EUGENE V. NELSON and JOHN DOE, *Appellants*.	No. 36725 Department Two

Filed. September 25, 1963.

The appellants, who were the defendants in the cause before the superior court, appeal from a judgment dated April 20, 1962, whereby they were permanently enjoined from picketing ". . . plaintiffs' establishment at 615-27 Queen Anne Avenue, Seattle, Washington . . . ." and by which respondents were awarded damages in the sum of $100.

The respondents, under the name Jack Behar Construction Company, were engaged in doing certain construction work to an apartment building which they leased and operated at the above-stated address. They had hired approximately 25 building trades employees, none of whom was a member of appellant Seattle Building and Construction [0032] Trades Council, or any of its affiliates. These employees were paid wages substantially below the prevailing union scales in the Seattle area, and received no fringe benefits. However, there was no dispute between them and the respondents, relative to wages or other benefits.

After first having advised respondents of their intentions, by letter dated March 20, 1962, the appellants commenced picketing respondents' premises, on or about March 22, 1962. The picketing was peaceful and no attempt was made to secure a collective bargaining agreement, nor to compel union affiliation by the employees. The work was continued, but certain construction suppliers and their employees ceased delivery of materials to the job, and commercial tenants of the respondents complained of the picketing because of damage to their business. A temporary injunction had been issued April 13, 1962.

This case was submitted to the trial court, on an agreed statement of facts. One of the stipulated facts was as follows:

"14. Plaintiffs have commitments under which the building should be completed before the end of April, 1962."

This fact, which was adopted by the trial court in its findings, is unchallenged on this appeal, and appears to follow and be based upon the allegation in respondents' complaint that:

"It is imperative that plaintiffs complete the construction and repair work now in progress on said building as soon as possible and before the end of April, 1962." [0033]

The injunction issued by the trial court is narrow in scope and restricted to the specific premises named. The stipulated facts indicate that it was necessary to complete the construction project before the end of April, 1962, which is now approximately one year past.

Although the record does not disclose the present status of the construction work, it does suggest, and it may well be reasonably assumed, that it has now been completed, and that there is no remaining controversy between the parties.

This poses a question which was not before the trial court, because it did not then exist, nor was it treased in the briefs, and at best was only casually and indirectly referred to by counsel in argument before this court. However, we must now consider it, because

"We have repeatedly held that we will not review a proceeding or cause which has become moot. . . ." *State ex rel. Jones v. Byers*, 24 Wn.(2d) 730, 733, 167 P.(2d) 464 (1946).

In *State ex rel. Johnston v. Tommy Burns, Inc.*, 188 Wash. 263, 264, 62 P.(2d) 47 (1936), we said:

"Although respondents also urge us to decide this question upon the merits, we decline to do so. The question is purely academic, and this court is not required to pass upon such questions. Courts will not knowingly determine moot questions, however much both parties desire such determination. *Holly-Mason Hardware Co. v. Schnatterly*, 111 Wash. 29, 189 Pac. 545; *State ex rel. Barnham v. Superior Court*, 180 Wash. 519, 41 P.(2d) 155. See, also, *Bellingham American Pub. Co. v. Bellingham Pub. Co.*, 145 Wash. 25, 258 Pac. 836."

In *State v. International Typographical Union*, 57 Wn.(2d) 151, 356 P.(2d) 6 (1960), an action arising out of a jurisdictional dispute between two unions, we reiterated the rule that [003A] will not take jurisdiction to decide moot cases, citing *Hansen v. West*

Coast Wholesale Drug Company, 47 Wn.(2d) 825, 827, 289 P.(2d) 718 (1955), wherein we said that:

"... A moot case is one which seeks to determine an abstract question which does not rest upon existing facts or rights. ... This court refuses to take jurisdiction of moot cases."

See, also, *State ex rel. Chapman v. Superior Court*, 15 Wn.(2d) 637, 131 P.(2d) 958 (1942); *National School Studios, Inc. v. Superior School Photo Service, Inc.*, 40 Wn.(2d) 263, 242 P.(2d) 756 (1952); *Friendly Finance Corporation v. Koster*, 45 Wn.(2d) 374, 274 P.(2d) 586 (1954); and *Brehm v. Retail Food and Drug Clerks Union, # 1105*, 4 Wn.(2d) 98, 102 P.(2d) 685 (1940).

If the construction work on the particular project here involved is now completed, as it would seem it is, neither party could gain any benefit by our either affirming or reversing the judgment of the trial court. We are unable, however, to determine conclusively from the present state of the record, whether the construction work has been completed or not. In view of this fact, we must remand the case to the trial court for entry of further findings of fact relating to this question with directions to dimiss the appeal, if it is found that the construction is completed.

The case is remanded to the trial court, which is directed to proceed in accordance with the instructions herein contained.

RYAN, J., Pro Tem

We concur:
OTT, C. J.
DONWORTH, J.
HAMILTON, J.

[0035]

No. 36725

FINLEY, J. (dissenting)—In the instant case it seems to me that the respondents were mainly interested in injunctive relief, and that this, in effect, put the controversy on the so-called "equity side" of the court. However, the respondents also requested relief in damages and their costs. The trial court granted equitable relief and awarded damages plus costs. The majority, emphasizing the equity aspects, speaks of this lawsuit as being moot and cites cases of this court relative to dismissal of appeals in such instances. The majority opinion states:

"If the construction work on the particular project here involved is now completed, as it would seem it is, neither party could gain any benefit by our either affirming or reversing the judgment of the trial court. . . . .

Lastly, the majority remands this case to the trial court for a determination as to whether the construction project here involved has been completed, and the trial court is directed to dismiss the action if the construction project has been completed. I think this completely overlooks the fact that $100 damages and costs have been awarded to respondents. In effect, the majority at the appellate level of this litigation seems to have split or compartmentalized the relief sought by plaintiffs and granted by the trial court, apparently viewing the injunction as equitable and the damages as legal in nature. Having thus, in effect, segregrated the relief granted by the trial judge, the [0036] majority apparently finds it necessary to consider the damages as a separate manner, ostensibly concluding that

the amount involved is insufficient to meet the constitutional jurisdictional requirement for appeal.

We have consistently held that the constitutional requirement of a $200 minimum for appeal this court (Washington Constitution, Art. 4, § 4) does not apply to equity actions. *Bradley v. Fowler* (1948), 30 Wn. (2d) 609, 192 P.(2d) 969; *Bowen v. Dept. of Social Security* (1942), 14 Wn.(2d) 148, 127 P.(2d) 682; *Ellison v. Scheffsky* (1926), 141 Wash. 14, 250 Pac. 452; *Fox v. Nachtscheim* (1892), 3 Wash. 684, 29 Pac. 140. Thus, if an action is equitable in nature, the amount in controversy as to appellate jurisdiction becomes inconsequential. But, when equity assumes jurisdiction over the subject matter of an action and of the parties to be affected, it will retain jurisdiction for all purposes and grant whatever relief the facts warrant. *Carstens Packing Co. v. Cox* (1955), 47 Wn.(2d) 346, 287 P.(2d) 486; *Hubbell v. Ward* (1952), 40 Wn.(2d) 779, 246 P.(2d) 468; *In re Schnoor's Estate* (1948), 31 Wn.(2d) 565, 198 P.(2d) 184. In the instant case the determination by the trial court that the union activity was unlawful provided the basis for the relief granted, and the injunction and damage relief are parts of the same ball of wax. Since the question of damages and the propriety of the injunction are so inter-related, it seems to me inappropriate for this court, in terms of appellate procedural technicalities, to separately consider and dispose of the two kinds of relief afforded by the trial [0037] court, particularly in light of the fact that such severance will probably result in a denial of any appellate review.

Normally, when there has been a legitimate assump-

tion of jurisdiction, a court will not later engage in technicalities to defeat its own jurisdiction. This reluctance to disclaim jurisdiction is indicated by *National Association of Creditors v. Grassley* (1930), 159 Wash. 185, 292 Pac. 416, wherein the appellant had three causes of action, each of which was for less than $200, and the court refused to sever them, treating them instead as an entity for the purpose of appellate jurisdiction.

The majority opinion ostensibly is predicated upon the assumption that the dispute with reference to the injunction may be moot, and, as mentioned above, the item of damages is simply relegated to obscurity. The rationale underlying the utilization of the doctrine of mootness seemingly is: (1) conservation of judicial time in avoiding advisory opinions and the answering of academic questions, and (2) the benefits of the adversary system, which is relied upon to present all the pertinent facts, policies and legal issues to the court, may be lost if a case is moot, as a party having nothing to gain may lack the incentive to prepare and present the case fully. Parenthetically, it should be noted that the briefs in this case evidence a thorough job of researching the law with reference to the merits of the controversy.

Even assuming, *arguendo*, that the building may have been completed and that the injunction issued in the instant case may no longer be effective, this does not deprive this [0038] court of jurisdiction under the theory of mootness. In *Bowen v. Dept. of Social Security*, (p. 153), our court stated, with reference to a request for the dismissal of an appeal on the basis of

mootness. "The rule does not rest upon a *want* of jurisdiction, but *refusal* to take jurisdiction of moot cases." Hence, a determination of mootness does not mean that the court lacks jurisdiction; but rather, such a determination only serves to relieve the court from the necessity of rendering a decision on the merits when such a decision would not accomplish any purpose. The Supreme Court of Kansas expressed this thought in *State ex rel. Anderson v. Engler* (1957), 181 Kan. 1040, 317 P.(2d) 432, 434:

"However, since mootness does not affect the court's jurisdiction, it will proceed to judgment whenever dismissal of an appeal adversely affects any rights vital to the parties, . . ."

In the instant case, even if the effectiveness of an injunction is moot, the matter of damages — whether somewhat obscure or lurking — nevertheless still remains. Thus, although a part of the controversy may be considered as moot, certainly some rights of the parties remain for review and final adjudication by this court; namely, the judgment for $100 and the costs against appellants, awarded to respondents in the trial court. For the reasons indicated I believe this court should render a decision on the merits of this controversy; consequently, I dissent.

FINLEY, J. [0039]

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IN THE

Supreme Court of the United States

October Term, 1963

No. 660

SEATTLE BUILDING AND CONSTRUCTION TRADES COUNCIL, an association, and JAMES K. BENDER, EUGENE V. NELSON and JOHN DOE,
Petitioners,

v.

RUSTY ROSLING and JACK BEHAR,
Respondents.

BRIEF FOR RESPONDENTS IN ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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RUSTY ROSLING and JACK BEHAR,	*Respondents.*	

BRIEF FOR RESPONDENTS IN ANSWER TO PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Washington

REASONS FOR DENYING THE WRIT

1. Jurisdiction

In discussing the question before the Court, a short statement of the salient facts should first be made. Respondents were engaged in doing certain construction work on an apartment and commercial building which they leased and operated (R. 17). To perform this work, Respondents hired approximately 25 men, none of whom were members of petitioner, Seattle Building & Construction Trades Council (R. 17). There was no quarrel between the Respondents and their non-union employees concerning the wages paid or the working conditions (R. 18). Petitioner placed a picket on the construction project who patrolled in front of Respondents' premises carrying a sign protesting substandard wages and conditions, (R. 19). Although Respondents' employees ignored

the picketing and continued working, certain construction suppliers and truck drivers delivering construction supplies observed the picketing and ceased to deliver (R. 19, 20). Commercial tenants on the ground floor of Respondents' building complained and demanded that the pickets be removed (R. 20).

Upon facts stipulated to by counsel for the respective parties, the trial court found that the conduct of Petitioners was coercive in nature and should be restrained (R. 28). On appeal, the Washington Supreme Court refused to consider the question of whether or not the picketing had been properly enjoined. It held that if the construction was completed, this question was moot (R. 33). A fact that particularly should be noted appears in the stipulation as follows (R. 20):

> "The value of construction materials annually purchased by the plaintiffs for use in Behar Construction Company activities, from sources directly and indirectly outside of the State of Washington, does not exceed the sum of $50,000."

The court has requested Respondents to distinguish its recent decision in *Liner, et al., v. Jafco, Inc., et al.*, No. 43, October Term, 1963, from the instant case. There, the Chattanooga Building Trades Council, AFL, placed a picket on a shopping center construction site to protest the lower than union scale wages paid by the general contractor to its non-union employees. In response to the picket, the construction workers ceased work. The respondent, Jafco, Inc., obtained an injunction from the Tennessee Chancery Court, despite Petitioner's motion to have it dissolved on the ground that the subject matter

of the picketing was exclusively within the jurisdiction of the National Labor Relations Board. The construction of the shopping center was completed pending the decision on appeal. In view of this fact the Court of Appeals of Tennessee held that the questions in controversy had become moot and further agreed with the lower court's finding that the matter was properly within the jurisdiction of the state courts (49 L.R.R.M., 2585). This Court held that it had jurisdiction to review the Tennessee court's decision, stating at page 8 of the opinion as follows:

> "... local rules which purport to preclude state appellate court adjudication of the federal preemption claim cannot conclusively render the case moot for purposes of this Court's review."

On the merits the Court held:

> "We hold that the issuance of the injunction was beyond the power of the Tennessee courts and therefore reverse the judgment."

An obvious distinction between that case and the present one is that in *Liner*, the respondent contractor purchased outside and brought into the state materials costing $147,099.67 which far exceeds the minimum monetary standards set by the National Labor Relations Board for the exercise of its jurisdiction. However, in the instant case the value of construction materials involved in interstate commerce was less than $50,000.00 (R. 20), thus below the National Labor Relations Board jurisdictional limit. Therefore, the National Labor Relations Board would not have exercised jurisdiction over this dispute even if an application for relief had been made to the Board. Petitioners herein have never asserted federal preemption as a de-

fense; nor could they, since this dispute is properly within the jurisdiction of the state court. (See page 10 of Petition.) The Court's concern in the *Liner* case was over the Tennessee court's usurpation of jurisdiction from a federal regulatory agency in a situation where federal law clearly preempted the field. Federal preemption is not present here. The present case is not an example as was *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176, of an area of judicial decision "within which the policy of the law . . . so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes."

A further distinction between *Liner v. Jafco, Inc., supra*, and the instant case is that in the former, the Court of Appeals of Tennessee, Eastern District, affirmed the lower court's finding that a labor dispute did not exist. Therefore, the Tennessee Appellate Court made a determination of the federal question that was presented throughout that controversy. Clearly, the Tennessee Appellate Court made a determination of the federal question which is a jurisdictional requirement essential to this Court's review of the Tennessee Court of Appeals' decision. In the instant case, however, the Washington Supreme Court decided only that if the construction was completed, the case was moot and declined to consider the federal question presented in this case (R. 35). Although the federal issues involved in this instant case were asserted on appeal before the State Supreme Court, that court made no determination of the question.

Petitioners herein pray that a Writ of Certiorari issue

to review the decision of the Washington State Supreme Court. The petition should be denied because the Washington Supreme Court made no determination of the federal question. This Court has held that it cannot consider a Writ of Error directed to a state appellate court where the state court has refused to exercise jurisdiction and has dismissed the appeal. *Western Union v. Hughes*, 203 U.S. 505; *Randall v. Board of Commissioners*, 261 U.S. 252. If in the instant case a Writ of Certiorari is issued as prayed for by Petitioners, the only question subject to review is the Washington Supreme Court's finding of mootness which involves only a rule of local law.

In the case of *Wolfe v. North Carolina*, 364 U.S. 177, 197, this Court stated:

> "The North Carolina Supreme Court did not decide this asserted federal question. We have found that it did not do so because of the requirements of rules of state procedural law within the constitutional power of the state to define, and here clearly delineated and even handily applied. We have no choice but to determine that this appeal must be dismissed because no federal question is before us."

In light of the mentioned distinctions, *Liner v. Jafco, Inc.*, *supra*, is not controlling the instant case. Here the State Supreme Court has applied a long-established rule limiting the exercise of its appellate jurisdiction. Such a determination has received the approval of the United States Supreme Court. As stated in *John v. Paullin*, 231 U.S. 583, 585:

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise, and the

> state law and practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law."

Petitioners do not assert nor is there a basis for claiming that the State Supreme Court determined the issues moot in order to avoid deciding a constitutional question. When a state court decides a case "upon grounds that have no relation to any federal question, this court accepts the decision, whether right or wrong." *Nickel v. Cole*, 256 U.S. 222, 225. In the instant case there is no indication that the State Supreme Court's decision that if the construction was completed, the case was moot, was in any way connected with or dependent upon a federal question. With regard to the reviewability of a state court's decision based upon independent state law, this Court stated in *Herb v. Pitcairn*, 324 U.S. 117, 125, 126, as follows:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds (cases cited). The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

2. Coercive Standard Previously Reviewed by This Court

In granting the injunction the trial court stated in effect that injunctive rights are limited to situations where there are no labor disputes and where the picketing is against state public policy (R. 37, 28). It is evident from the memorandum opinion that the trial judge understood that the state public policy requires that picketing be enjoined when it ceases to be persuasive only and becomes coercive. The State of Washington's public policy that picketing may be enjoined when the effect, in situations where there is no labor dispute, becomes coercive in nature, has been review by this Court in two decisions as recently as 1950. *International Brotherhood v. Hanke*, 339 U.S. 469; *Building Service Union v. Gazzam*, 339 U.S. 531. In *International Brotherhood v. Hanke*, *supra*, this Court stated at page 473 as follows:

> "Here, as in *Hughes v. Superior Court*, 339 U.S. 460, ante, 985, 70 S. Ct. 718, we must start with the fact that while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech. Our decisions reflect recognition that picketing is indeed a hybrid' (cases cited). The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and the power of the state to set the limits of permissible contest open to industrial combatants."

With reference to the undermining of union standards this Court continued, 339 U.S. 475:

> "Unions obviously are concerned not to have union standards undermined by non-union shops. This interest penetrates into self-employer shops. On the other hand, some of our profoundest thinkers from

> Jefferson to Brandeis have stressed the importance to a democratic society of encouraging self-employer economic units as a counter-movement to what are deemed to be the dangers inherent in excessive concentration of economic power. 'There is a widespread belief . . . that the true prosperity of our past came not from big business, but through the courage, the energy and the resourcefulness of small men . . . and that only through participation by the many in the responsibilities, and determinations of business can Americans secure the moral and intellectual development which is essential to the maintenance of liberty.'"

CONCLUSION

In contrast to *N. L. Liner, et al. v. Jafco, Inc., et al.*, No. 43, October Term, 1963, Petitioners herein do not contend that this controversy is outside the jurisdiction of the Washington courts. In fact, Petitioners admit that federal preemption does not apply since Respondents' purchases of supplies and materials did not meet the dollar value jurisdictional standards of the National Labor Relations Board. Therefore, since the Superior Court properly exercised jurisdiction, the State Supreme Court's finding of mootness should be regarded as a proper application of local law and a final disposition of the case.

Respectfully submitted,

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